OCT 3 1955
HAROLD B. WILLEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955

No. 441

ALONSITA WALKER, ET AL.,
*Petitioners,*

vs.

BOARD OF COUNTY COMMISSIONERS OF TALBOT COUNTY, ET AL.,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

HYMAN A. PRESSMAN,
337 St. Paul Place,
Baltimore 2, Maryland,

HERBERT H. BALCH,
Easton, Maryland,
Counsel for Petitioners.

The Daily Record Co., Baltimore 3, Md.

# INDEX

## Table of Contents


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Constitutional Provisions and Ordinance Involved | 2 |
| Statement | 3 |
| Reasons for Granting the Writ | 7 |
| Conclusion | 12 |
| Appendix A | 13 |
| Appendix B | 16 |


## Table of Citations

### *Cases*


| | |
|---|---|
| Abie State Bank v. Bryon, 282 U. S. 765 | 7, 10 |
| Comer v. City of Dearborn, Mich., 70 N. W. 2d 813 | 7, 9 |
| City of West University Place v. Ellis, Tex., 134 S. W. 2d 1038 | 7, 9 |
| Hannifin Corp. v. City of Berwyn, 1 Ill. 2d 28 | 7, 8 |
| Nashville, Chattanooga & St. Louis Railway v. Walter | 7, 10 |
| Nectow v. City of Cambridge, 277 U. S. 183 | 7 |
| Tower Cabana Club v. City of Chicago, 128 N. E. 2d 834 | 7, 8 |
| Vernon Park Realty v. Mount Vernon, 307 N. Y. 493 | 7, 9 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955

No. ------

ALONSITA WALKER, ET AL.,

*Petitioners,*

vs.

BOARD OF COUNTY COMMISSIONERS OF TALBOT COUNTY, ET AL.,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners respectfully pray that a writ of certiorari issue to review the decision and judgment of the Court of Appeals of Maryland, which affirms the decree of the Circuit Court for Talbot County, Maryland.

## OPINIONS BELOW

The opinion of the Court of Appeals of Maryland (Appendix B, infra, p. 16) is reported at 116 A. 2d 393. The opinion of the Circuit Court for Talbot County, Maryland, was not reported, but is set forth on pages 23 to 37 of the Appellants' Appendix before the Court of Appeals of Mary-

land, nine copies of which Appellants' Appendix have been filed in accordance with paragraph 4 of Rule 21 of this Court. The part of said opinion pertaining to the questions involved herein is printed as Appendix A, infra, p. 13.

## JURISDICTION

The judgment of the Court of Appeals of Maryland (Appendix B, infra, p. 16) was rendered on July 27, 1955. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1257(3).

## QUESTIONS PRESENTED

1. Is a zoning ordinance unconstitutional in so far as it applies to a group of properties when it requires the use of those properties for purposes which are impractical and unprofitable and denies the use of those properties for purposes for which they are most peculiarly suitable and highly profitable, when the profitable use of the property would cause no disadvantage or loss to the surrounding properties or to the public?

2. Where a court specifically finds from the evidence that property is peculiarly adaptable as a deep water port and a a site for heavy industry, can it disregard this fact on the basis that it was not known to the zoning officials at the time of the enactment of the zoning ordinance?

## CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

The Constitutional provisions which are relevant to the decision of this case are Amendments XIV and V of the United States Constitution, which provide in pertinent part:

Section 1, Amendment XIV — "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *".

Amendment V — "* * * nor (shall any person) be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The case also involves the Talbot County Zoning Ordinance (App. 326).*

## STATEMENT

Petitioners own six parcels of land consisting of approximately 836 acres of land. They filed suit against the Board of County Commissioners, Planning and Zoning Commission and Appeal Board for the Planning and Zoning Commission of Talbot County for a declaratory decree and injunction, alleging that the Talbot County Zoning Ordinance "deprives the Plaintiffs of the rightful use of their property without due process of law, takes said property without compensation and denies to the Plaintiffs the equal protection of the laws in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States and of Article 23 of the Declaration of Rights of the Constitution of Maryland, and therefore, said Ordinance is unconstitutional and void in so far as it affects the Plaintiffs' properties" (App. 8, 9). The bill of complaint also alleged that "said ordinance as applied to the Plaintiffs' properties is not a proper exercise of the police power and is arbitrary, unreasonable, oppressive, confiscatory, discriminatory and illegal and that it is without any reasonable relation to the public health, safety or welfare" (App. 8). Other attacks were made upon the ordinance, but since they did not involve any federal question, they are being disregarded in this petition.

Petitioners' property was included in an agricultural zone instead of an industrial zone in disregard of its peculiar

* Figures in parentheses preceded by "App." are references to Petitioners' Appendix in the Court of Appeals of Maryland.

suitabililty for industrial purposes. The property consists of unprofitable farmland (App. 210, 298), poor marshland (App. 43, 211, 212, 298) and cut over woodland (App. 296, 297). The income from the land is less than the amount of taxes (App. 211). The land has been eroding, so that a quarter mile of waterfront has eroded 100 feet in the last 25 years (App. 211, 212). No crops are grown on the farm owned by the Petitioner Florence Lowe, consisting of 257 acres (App. 215, 216) and it has not been farmed for at least 4 or 5 years (App. 216). The properties are peculiarly suitable for industry and would be highly valuable for such use (App. 157, 158, 165, 211, 282). Petitioners produced eminent expert witnesses to prove that these properties make up the most suitable site for general modern industry on the Atlantic seaboard which has not already been occupied by industry or the military services (App. 160, 56). The depth of the water and nature of the shore line is such that it is economically practical to construct a large deep water port with sufficient depth to accommodate the largest ocean going vessels (App. 157, 158, 167, 196). Water tests on the properties showed a water supply under the surface sufficient to produce twenty million gallons of water a day which was adequate to support a large oil refinery or other heavy industry at the location (App. 181) without interfering with sources of water now used in the area (App. 180). Railroad facilities are in close proximity to the site and could be extended to an industrial plant at a reasonable cost (App. 76). The Department of Defense has issued a certificate of necessity authorizing the construction of the port and declaring it to be essential for national defense (App. 199). *The opinion of the trial Court stated that Appellants established these facts by the evidence* (Appendix A, infra p. 14), in the following language:

> "The plaintiffs produced evidence which established that the properties in question, especially the Walker

properties, could by the expenditure of five million dollars for dredging and fill, be developed into a large deep water port with sufficient depth to accommodate the largest ocean going vessels. That the depth of the water and nature of the shore line at these properties made them more suitable for a deep water port than any location on the Atlantic seaboard from Sandy Hook to Cape Hatteras that was immediately available. That a corporation known as Port of Chesapeake Authority, Inc., which was formed subsequent to the adoption of the final ordinance, was willing and able to construct such a port. That water tests made on the Walker farms showed a water supply under the surface sufficient to produce twenty million gallons of water a day which was adequate to support a large oil refinery or other heavy industry at the location. That railroad facilities were existent in close proximity to the farm and could be extended to an industrial plant at a reasonable cost. That a certificate has been issued by the Department of Defense authorizing the construction of the proposed port."

An industrial survey and report made by the Planning and Zoning Commission after the adoption of the ordinance reported many of these and other factors to show excellent opportunities in Talbot County for industry (App. 327). The evidence of the peculiar suitability of the property for industry was uncontradicted. Petitioners produced a real estate developer and broker who testified that the location of industry on their properties would very much increase their value (App. 222), would increase the value of the surrounding property very much (App. 222) and would benefit nearby towns such as Easton and St. Michaels (App. 222, 223). Petitioners also showed that it would be of advantage to the residents of the area for an industry to locate there, for it would give employment opportunities to the young people who are being forced to leave the county to seek employment (App. 214, 219, 263). It was also shown

that the area contains a labor supply suitable for industry (App. 212, 213, 219).

Almost all the people in the large district which is one of the five districts of the county were strongly in favor of industrialization (App. 109, 255). The Commissioners of the nearby town of St. Michaels notified the County Commissioners that they favored an oil company locating on the Petitioners' property (App. 91). The Planning and Zoning Commission sponsored a visit to two oil refineries where they learned that a properly planned and operated oil refinery would not permit any pollution of air or water (App. 110), and that there was no damage to surrounding farm lands (App. 220, 221).

Even without an oil refinery, the property is peculiarly suitable for a deep water port facility which would profitably handle general cargo and commodities (App. 191, 196). It is for this latter purpose that the project was officially declared to be necessary in the interest of national defense.

The Circuit Court for Talbot County decreed the zoning ordinance to be constitutional for the reason that "the peculiar factors which make the plaintiffs' property adaptable as a deep water port or a site for heavy industry were neither known nor by the conduct of a reasonable land use study should have been known to the zoning authorities at the time of the adoption of the final ordinance classifying the plaintiffs' property as farming. It would seem clear that the reasonableness of classifying this property as agricultural must be determined in the light of facts known or those which should have been known to the authorities on May 16, 1953 and not in the light of factors made known since that date. By this rule the court holds that the classification of the Plaintiffs' property as agricultural on May 16, 1953 was reasonable and in the interest of the health,

safety, morals and general welfare of the public of Talbot County." (Appendix A, infra p. 15). Th Court of Appeals affirmed the decision of the Circuit Court and ruled that the Zoning Ordinance did not violate the Federal Constitution in its application to the Petitioners' property (Appendix B, infra p. 33).

## REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals of Maryland is in direct conflict with this Court's decision in Nectow v. City of Cambridge, 277 U. S. 183, 48 S. Ct. 447, 72 L. Ed. 842 on the exact question presented; i. e., the unconstitutionality of a zoning ordinance insofar as it applies to certain property when the uses which the ordinance permits on the property "is of comparatively little value." The decision below also conflicts squarely with the cases of Hannifin Corp. v. City of Berwyn, 1 Ill. 2d 28, 115 N. E. 2d 315; Tower Cabana Club v. City of Chicago, 123 N. E. 2d 834; Comer v. City of Dearborn, Mich., 70 N. W. 2d 813; City of West University Place v. Ellis, Tex., 134 S. W. 2d 1038; and Vernon Park Realty v. Mount Vernon, 307 N. Y. 493, 121 N. E. 2d 517. The reason given by the Circuit Court for Talbot County for its decision, that the reasonableness of the regulation must be determined in the light of facts known at the time of enactment and not in the light of factors made known later, is repugnant to the decision of this Court in Nashville, Chattanooga & St. Louis Railway v. Walter, 294 U. S. 405, 415, 55 S. Ct. 486, 488, 79 L. Ed. 949, 955, and Abie State Bank v. Bryon, 282 U. S. 765, 776, 51 S. Ct. 252, 257, 75 L. Ed. 690, 701.

1. In the Nectow Case, which has been used as a guidepost by state courts and which this Court has not seen fit to change in 27 years since it was decided, a zoning ordinance was held to be in violation of the Fourteenth Amend-

ment to the Federal Constitution in so far as it restricted the plaintiff's property to residential uses since "no practical use can be made of the land in question for residential purposes, because among other reasons herein related, there would not be adequate return on the amount of any investment for the development of the property" and "the locus is of comparatively little value for the limited uses permitted by the ordinance". In the case now before this Court, the property not only fails to bring an adequate return on the investment as zoned, but it operates at a loss because the income from the land is less than the amount of taxes (App. 211) and a substantial part of the property is swampland and cut over woodland and therefore is useless except for industrial purposes.

The value of the Walker property, consisting of 640 acres, was stated to be $340,000 for use as a port facility, which amounts to over $531 an acre (App. 190). The marshland, on the other hand, when not used for industrial purposes, was valued at $10 an acre (App. 298).

The prohibition of the use of this property industrially is more unreasonable than the residential zoning of the land in the case of Hannifin Corp. v. City of Berwyn, 1 Ill. 2d 28, 115 N. E. 2d 315, in which the highest and best use of the land for industrial purposes was approximately $225,000, whereas it was only worth approximately $50,000 for residential use. It was held that the industrial zoning would be highly destructive of value, that no gain to the public would result compared to the hardship imposed and was therefore manifestly unreasonable and unconstitutional because of its confiscatory effect.

In a very recent case, Tower Cabana Club v. City of Chicago, 123 N. E. 2d 834, the Supreme Court of Illinois held the restriction of property to single-family residences

to be "unreasonable and void, having the effect of depreciating the values of the property without correspondingly benefitting the public generally" where a real estate appraiser estimated that the use of the property for single-family residences would make them worth $40 per foot upon the expenditure of $35 per foot, whereas if restrictions were removed, the property in its present state would be worth $20 per foot.

For similar reasons, zoning ordinances were held to be arbitrary, unreasonable and void as to certain properties in Comer v. City of Dearborn, Mich., 70 N. W. 2d 813, and City of West University Place v. Ellis, Tex., 134 S. W. 2d, 1038.

The Court of Appeals of Maryland took the position that if the property can possibly be used in the manner in which it is zoned, the zoning can not be disturbed, without consideration of the fact that the use of part of the property for farming is unprofitable and that the remainder of the property is poor marshland and cut-over woodland. However, in the recent case of Vernon Park Realty v. Mount Vernon, 307 N. Y. 493, 121 N. E. 2d 517, 520, it was held that where zoning "precludes the use for which it is most readily adapted", it is "so unreasonable and arbitrary as to constitute an invasion of property rights, contrary to constitutional due process and, as such, are invalid, illegal and void".

Petitioners consider it highly significant in this case that there was no evidence presented to show that the industrial use of the property in question would harm or inconvenience any of the surrounding property or the public generally. The only witness who was produced for such purpose testified that the immediate use of the industrial zoning of the property would be a depreciation of the values on

residential properties in the immediate area when offered as agricultural properties and pleasant places to live, but he then admitted that when industry appeared on the scene and a new market was opened it would make the surrounding property of even greater value (App. 300, 301).

At least an indication that the people in the area do not consider the agricultural zoning of the property to have any reasonable relation to the public health, safety or welfare is the fact that 152 property owners of Talbot County and an organization of over 600 property owners and residents of the District where the property lies intervened as parties plaintiff. The defendants were only able to muster five husbands and wives and one additional property owner who intervened as parties defendant. The defendants also admitted and their minutes of a public meeting show that the "people of Bay Hundred were strongly in favor of industrialization as means of improving their standard of living" (App. 109, 255).

2. The Circuit Court for Talbot County found that the property was peculiarly adaptable as a deep water port and a site for heavy industry but ruled that this was not known at the time of the enactment of the zoning ordinance and therefore could not be considered. (Appendix A, infra p. 15). This ruling was clearly in opposition to the statement of Chief Justice Hughes in Abie State Bank v. Bryon, 282 U. S. 765, 776, 51 S. Ct. 252, 257, 75 L. Ed. 690, 701:

> "A police regulation, although valid when made, may become, by reason of later events, arbitrary and confiscatory in operation".

Also, in Nashville, Chattanooga & St. Louis Railway v. Walter, 294 U. S. 405, 415, 55 S. Ct. 486, 488, 79 L. Ed. 949, 955, the Supreme Court of Tennessee refused to consider evidence of changed economic and transportation conditions

during the ten years following the enactment of a state tax on railroads for one half the cost of separating grade crossings on the theory that they could only consider the constitutionality of the statute at the time of its passage. This Court ruled to the contrary. Mr. Justice Brandeis delivered the opinion of the Court, which said:

> "A statute valid when enacted may become invalid by change in the conditions to which it is applied. The police power is subject to the constitutional limitation that it may not be executed arbitrarily or unreasonably."

The granting of certiorari will prevent a grievous and unnecessary wrong. The uncontradicted evidence establishes that Petitioners' properties consist of unprofitable farmland, useless marshland and cut over woodland, that the properties are peculiarly suitable for industry and would be highly valuable as such and that the use of the properties for industry will increase the value of surrounding property. The agricultural zoning of the properties therefore deprives Petitioners of the reasonable use thereof without due process of law and is unconstitutional. Such zoning not only causes extreme hardship to Petitioners but also constitutes a loss to the community, a waste of precious natural resources, a hindrance to progress and an interference with a project which has been officially declared by the Office of Defense Mobilization to be necessary for national defense.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

HYMAN A. PRESSMAN,
337 St. Paul Place,
Baltimore 2, Maryland,

HERBERT H. BALCH,
Easton, Maryland,
Counsel for Petitioners.

## APPENDIX A

*In the Circuit Court for Talbot County*

*Chancery No. 3367*

*Alonsita Walker, et al., Plaintiffs,*

*vs.*

*Board of County Commissioners of Talbot County, et al., Defendants.*

OPINION OF THE COURT

(Filed March 29, 1955)

This suit is instituted by property owners of the Bay Hundred District of Talbot County for a declaratory decree in respect to the general zoning ordinance adopted on May 16th, 1953 by the Board of County Commissioners for Talbot County. The bill prays that the ordinance be declared invalid and unconstitutional as a whole or in the alternative insofar as it affects the plaintiffs' properties and that an injunction be issued restraining its enforcement. The validity of the ordinance is challenged on three grounds; first, that the enactment procedure employed did not comply with the mandatory requirements of the enabling legislation; second, that the provisions of the ordinance itself did not comply with the enabling act (Article 66B of the 1951 Code) nor fulfill the requirements of a valid zoning ordinance; and thirdly, that the properties of the plaintiffs were zoned agricultural rather than industrial in disregard of their peculiar suitability for industrial purposes and the general welfare of the public.

* * * * * *

III. The third major ground assigned by the plaintiffs which they contend make the ordinance invalid and unconstitutional is that their properties are peculiarly suitable for industrial purposes and the zoning thereof as agricultural is arbitrary, capricious and unreasonable. The evidence presented in respect to this contention shows that the material facts concerning the plaintiffs' properties which were known to the zoning authorities on May 16th, 1953 when the ordinance was formally adopted were; (1) that the properties were farms used and occupied as such and had always been farms, and (2) that they were located in a farming neighborhood. The plaintiffs produced evidence which established that the properties in question, especially the Walker properties, could by the expenditure of five million dollars for dredging and fill, be developed into a large deep water port with sufficient depth to accommodate the largest ocean going vessels. That the depth of the water and nature of the shore line at these properties made them more suitable for a deep water port than any location on the Atlantic seaboard from Sandy Hook to Cape Hatteras that was immediately available. That a corporation known as Port of Chesapeake Authority, Inc., which was formed subsequent to the adoption of the final ordinance, was willing and able to construct such a port. That water tests made on the Walker farms showed a water supply under the surface sufficient to produce twenty million gallons of water a day which was adequate to support a large oil refinery or other heavy industry at the location. That railroad facilities were existent in close proximity to the farm and could be extended to an industrial plant at a reasonable cost. That a certificate has been issued by the Department of Defense authorizing the construction of the proposed port. All of these factors however came to light through the surveys of experts employed by the property owners to make a special study of the property with a view to its adaptability for a deep water port and heavy industry and were not known to the zoning authorities at the time of the adoption of the zoning ordinance on May 16th, 1953. The question of whether such factors should have been known to the authorities at that time through

proper studies of land use and potential in the County presents the principal inquiry in respect of this contention. In attempting to properly zone the County the authorities employed an expert who conducted exhaustive studies and surveys for approximately eighteen months prior to the enactment of the final ordinance and advised with the authorities in respect thereto. Many public meetings were held at which the plaintiffs had full opportunity to bring the peculiar suitability of their property for industry to the attention of the authorities. In conducting a land use survey it seems reasonable that the property owners should bring to the attention of the zoning authorities peculiar factors of their property which are below the surface and therefore not visible upon ordinary examination of the area rather than to require the zoning authorities to test the depth of the off shore water and potential quantity of the under surface water throughout the County. Such a requirement of the authorities prior to enactment of a zoning ordinance would be practically prohibitive from the standpoint of expense, as well as the time involved in completing such a study. This court holds therefore that the peculiar factors which make the plaintiffs' property adaptable as a deep water port or a site for heavy industry were neither known nor by the conduct of a reasonable land use study should have been known to the zoning authorities at the time of the adoption of the final ordinance classifying the plaintiffs' property as farming. It would seem clear that the reasonableness of classifying this property as agricultural must be determined in the light of facts known or those which should have been known to the authorities on May 16, 1953 and not in the light of factors made known since that date. By this rule the court holds that the classification of the plaintiffs' property as agricultural on May 16, 1953 was reasonable and in the interest of the health, safety, morals and general welfare of the public of Talbot County. Even if the reasonableness of the classification were "fairly debatable" this court could not disturb it. See Zang v. Taylor, 102 A. 2nd 723; Wakefield v. Kraft, 202 Md. 136.

The validity of the final ordinance adopted May 16th, 1953 is presumed and the burden of proving the contrary is upon the plaintiffs; See Etchison v. Frederick City, supra; Spann v. Gaither, supra, Eastern Tar Products Corporation v. State Tax Comm., 176 Md. 290. The court finds the plaintiffs have failed to establish the invalidity of the ordinance by a preponderance of the evidence and therefore rules that it is a valid and constitutional exercise of the authority delegated by Article 66B.

The court will sign a declaratory decree in accordance with this opinion.

J. DEWEESE CARTER,

Judge.

---

## APPENDIX B

*In the Court of Appeals of Maryland*

---

*October Term, 1954*

---

*No. 180*

---

*Alonsita Walker, et al., Appellants,*

*vs.*

*Board of County Commissioners of Talbot County, et al., Appellees.*

OPINION BY COLLINS, J.:

(Filed July 27, 1955)

This is an appeal from a decree denying the relief prayed in plaintiffs' bill of complaint.

Pursuant to Code, 1951, Article 66B, the County Commissioners of Talbot County, (the Commissioners), on May

16, 1953, adopted a zoning ordinance, (the Zoning Ordinance). The plaintiffs, appellants here, five property owners, as property owners filed an amended bill of complaint on February 21, 1955, against the Commissioners, the Planning and Zoning Commission, (the Commission), and the Appeal Board for the Commission, (Appeal Board), asking for a declaratory decree declaring the aforesaid Zoning Ordinance invalid and unconstitutional in its entirety; in the alternative that the Zoning Ordinance be declared invalid and unconstitutional insofar as it affects the property of the plaintiffs; that the defendants be enjoined from enforcing said Zoning Ordinance in the use of their properties for industrial purposes; and for other and further relief.

The decree declared that the Zoning Ordinance was valid, constitutional and in full force and effect; that the Commission is legally constituted and entitled to function under the provisions of Code, 1951, Article 66B, supra; that the Appeal Board was legally created and is legally constituted and entitled to function as such under the provisions of Article 66B, supra; and requiring appellants to pay the costs of the proceedings. From that decree appellants appeal here.

The bill of complaint alleges and the appellants claim that the Commission was not legally created. Article 66B, supra, Section 12, provides in part: "(Personnel of the Commission.) The Commission shall consist of five members, namely, a member of the Council and four persons who shall be appointed by the mayor, and confirmed by the council, if the mayor be an elective officer, otherwise by such officer as council may in the ordinance creating the Commission designate as the appointing power. All members of the Commission shall serve as such without compensation. The term of the *ex-officio* member shall correspond to his official tenure. The term of each member shall be five years or until his successor takes office, except that the respective terms of the five members first appointed shall be one, two, three, four, and five years."

By Article 66B, supra, Section 10, "mayor" is defined as "the chief executive of the political subdivision, whether the official designation of his office be Mayor, City Manager or otherwise." "Council" is defined as "the chief legislative body of the political subdivision." On August 14, 1951, the Commissioners unanimously passed Planning and Zoning Ordinance No. 1 creating the Commission and appointed five members: One, (Mr. Norman W. Harrington), for a term of one year; one for a term of two years; one for a term of three years; one for a term of four years; and one for a term of five years. They failed to name a member of the Commissioners to this Commission. It is conceded by the appellees that the Commission was originally improperly constituted. However, failure to appoint a proper Commission would not invalidate the Ordinance as a whole. Cf. *Bostock v. Sams*, 95 Md. 400, 418, 52 A. 665. Insofar as the Ordinance authorized the appointment of a Commission it could take effect at once, subject to the filling of vacancies by subsequent action of the "Mayor" and "Council". On February 13, 1952, Mr. Harrington, one of the original members of the Commission, upon entering military service was forced to resign. At that time it was discovered that a member of the Commissioners was not included on the Commission. The Commissioners then unanimously appointed Mr. Omer Dulin, the President of the Commissioners, to the Commission. Mr. Dulin was appointed to fill the unexpired term of Mr. Harrington, whose term being for one year, expired on August 14, 1952. Mr. Dulin served on the Commission as a hold-over member until his term expired as County Commissioner in 1954, when he was again re-elected a County Commissioner. He has continued to serve as a hold-over member up to the time of the hearing below. His term from his original appointment on February 13, 1952, has in fact corresponded with his official term as a member of the Commissioners since that time. In *Benson v. Mellor*, 152 Md. 481, 137 A. 294, a case involving the tenure of office of a County Commissioner, it was held that in the absence of a contrary intention incumbents in office rightfully hold over and perform the duties of their offices until the qualification of

their successors, although there may be no express provision in the law for it. We must, therefore, hold that the legislative intent that a member of the Commissioners be a member of the Commission was complied with on February 13, 1952.

Appellants contend that the appointments should have been made by the President of the Commissioners and confirmed by the Commissioners under Article 66B, Section 12, supra, and that under the Constitution of Maryland, Article 11A, Section 3, the President of the Commissioners is the chief executive officer of that body. The appointments were made and approved by the Commissioners when all members were present. If the President of the Commissioners had not agreed to those appointments, it is reasonable to assume that his disapproval would have been a matter of record. There is no record of his disapproval. From February 13, 1952, Mr. Dulin served with the other members of the Commission which is an indication of his approval of those members. We are of opinion that this was a sufficient compliance with the Enabling Act.

Appellants also complain because Mr. Norman Howeth resigned from the Commission on March 5, 1953, and his successor was not appointed until May 26, 1953. There is nothing in the record to show that the Commissioners did not act with reasonable promptness, under the circumstances, to fill the vacancy.

Appellants further alleged and contend that the Appeal Board was not legally created. Code, 1951, Article 66B, supra, Section 22, provides in part: "(Board of Appeals.) The council shall provide for the appointment of a Board of Appeals, * * * . The Board of Appeals shall consist of three members." The minutes of the Commissioners show that on September 8, 1951, the Commissioners appointed three members to the Appeal Board. The appellants contend that because these appointments were not made by the President of the Commissioners alone, the Appeal Board was not validly constituted. The testimony shows that all the Commissioners agreed to these appointments. Therefore, the President of the Commissioners agreed to

the appointments and they were confirmed by the council. As stated by the chancellor, it seems clear from the minutes of the Commissioners that each additional appointment was to replace a retiring member. There is no evidence that appellants ever appealed to this Appeal Board.

The appellants further contend that there was no preliminary report thereon by any Planning Commission prior to a final report by such Commission nor has there been any final report by any Planning Commission prior to the enactment of the Zoning Ordinance and that there were no hearings thereon. Code, 1951, Article 66B, supra, Sections 21(d) and 21(f) provides: "21(d) (Method of Procedure.) The council shall provide for the manner in which such regulations and restrictions and the boundaries of such districts shall be determined, established and enforced, and from time to time amended, supplemented or changed. However, no such regulation, restriction or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least fifteen (15) days' notice of the time and place of such hearing shall be published in an official paper or a paper of general circulation in such municipality. * * * 21(f) In order that the municipality may avail itself of the zoning powers conferred by this sub-title, it shall be the duty of the Planning Commission to recommend the boundaries of the various original districts and appropriate regulations to be enforced therein. Such Commission shall make a preliminary report and hold public hearings thereon before submitting its final report and the council shall not hold its public hearings or take action until it has received the final report of such commission." Mr. Dulin testified that the Commission, of which he was a member, had a meeting on April 6, 1953, and on April 7th, Mr. Voshell, a member of the Commission, appeared before the Commissioners and reported to them about the meeting of the Commission on the previous evening. Mr. Voshell in his testimony read the following from the minutes of the meeting of the Commission of April 6, 1953: "The Commission reviewed the revised draft of the Ordinance of Talbot County, including the maps which

had been prepared at the request of the 'Citizens Committee for Talbot County Development'. The Commission tentatively approved these drafts, subject to further consideration when a public hearing is planned." He testified that he went before the Commissioners the next day and informally presented to them what the Commission thought desirable to present at the public hearing. He said that on April 7th he went over in complete detail with the Commissioners the proposed Ordinance, the maps and what the maps showed, and the Commissioners agreed that this would be presented at the public meeting. He told them when he thought this public meeting should be held and asked their concurrence. We are of opinion that the maps and proposed Ordinance showing the tentative zoning constituted the necessary preliminary report to the Commissioners. The Enabling Act, Section 21(f), supra, requires the Commission to recommend the boundaries of the districts and the appropriate regulations to be enforced therein. This preliminary report is to be submitted before a public hearing is held. We can find no provision for formal action of the Commissioners on that preliminary report or as to the form of that report. The maps and proposed Ordinance submitted appear to have been sufficient. Through the newspaper advertisement, which was published as hereinafter stated, and the reference therein to the maps and draft of the Ordinance, which were open for public inspection at the office of the Commission, the requirement for submitting the preliminary report to the public was met in that it was thus presented in usable, written form and served as a proper and adequate basis for discussion at that public meeting.

The exhibit shows that "once in each of one week beginning the 4th day of April, 1953", a notice of public hearing was published in the Easton Star-Democrat of Easton, Talbot County. This was a notice that a public hearing would be held in the Easton High School in Easton on Monday, April 27, 1953, "* * * for the purpose of presenting a draft of a master plan and zoning ordinance for all of Talbot County, prepared to meet specifications of the five-point program advanced by the Citizens Committee for Talbot

County Development. This hearing is called at the request of the Citizens Committee for the purpose of presenting this plan to the County, and determining if the county is ready to support it. All interested persons are hereby notified of said hearing and are invited to attend. A draft of the ordinance and maps are available for inspection at Planning and Zoning Commission's office in the County Building, Easton." The minutes of the Commission show that this public hearing was held as advertised on April 27, 1953, that an estimated five hundred people attended, and that a special meeting of the Commission was held immediately following the public hearing. It was the opinion of the Commission, Mr. Dulin voting in agreement, "that a very great majority of those attending the open meeting were in favor of the plan presented and those attending represented the great bulk of the County." The Commission therefore voted to recommend the plan as presented at the public hearing to the Commissioners. Appellants' objection to the meeting of April 27th seems to be that it was conducted by the Citizens Committee for Talbot County rather than by the Commission. Mr. Voshell, a member of the Commission, testified that he conducted the public hearing of April 27th. Offered in evidence was a letter to the Commissioners from Mr. Voshell, temporary chairman, stating that the Commission voted unanimously to recommend the plan presented at the public hearing of April 27th and that a great majority of those present at the meeting were in favor of the plan. The letter further stated: "Please therefor consider this our formal recommendation of the attached plan and the maps dated, April 28, 1953."

The Commissioners by advertisement printed in the Easton Star-Democrat once in each of three successive weeks before the fifteenth day of May, 1953, gave notice of a public meeting to be held in the Easton Armory on May 16, 1953, for the purpose of a discussion of the enactment of an ordinance, including a map of a master plan for the zoning of Talbot County. In addition to the notice of this meeting, the full text of the proposed Ordinance was published for two successive issues in the Easton Star-Democrat. At the public meeting in the Armory on May 16th approximately

one thousand people were present. The large majority of those present were in favor of the proposed Ordinance. It therefore appears that the necessary public hearings were held on the Zoning Ordinance.

Code, 1951, Article 66B, supra, Section 17, provides in part: "Before the adoption of the plan or any such part, amendment, extension, or addition the Commission shall hold at least one public hearing thereon, notice of the time and place of which shall be given by one publication in a newspaper of general circulation in the municipality."

The testimony shows that after this second public meeting the Commissioners met and made certain very minor changes in the Ordinance. Appellants contend that the Commissioners had no power to change the Ordinance after the public meetings and that it should have been adopted in exactly the same form as there presented. Of course, the object of the public hearing was to give the public an opportunity to criticize and recommend changes in the Ordinance. It could hardly be contended that, if the Commissioners decided to make minor changes in the Ordinance, public meetings would have to be continuously held until the Ordinance was submitted in its exact final form. It is evident that these minor changes were not substantial and did not violate the intent of the Enabling Act. The same contention was made in the case of *Town of Burlington v. Dunn*, (Mass., 1945), 61 N. E. 2d 243. It was there said: "There is nothing in the statute requiring another hearing whenever, as the result of one hearing, the board decides to amend what had previously been proposed. The amendments were not of a fundamental character."

Appellants further contend that the zoning maps are uncertain, indefinite, self-contradictory and irreconcilable. It is admitted that there are some slight errors in these maps where certain lines over-lap and minor areas contain wrong colors. The zones are "reasonably capable of comprehension." *Mallett v. Village of Mamaroneck*, 123 N. Y. S. 2d 249; *Auditorium, Inc. v. Board of Adjustment*, (Del.), 91 A. 2d 528. However, none of these defects in any way affect appellants' property. These errors could be corrected by

administrative action of the Commissioners. Article 66B, supra, Section 21(e), provides in part: "(Changes.) Such regulations, restrictions and boundaries may from time to time be amended, supplanted, changed, modified or repealed." Such minor irregularities will not vitiate zoning ordinances. *Speroni v. Board of Appeals of City of Sterling*, 368 Ill. 568, 15 N. E. 2d 302. There is no claim here that anyone had difficulty in determining the zoning of his property.

As to the contention that the Zoning Ordinance as finally adopted did not provide for an Appeal Board and for appointment of its members, Section IX of the Zoning Ordinance provides for the powers and duties of the Appeal Board and the procedure of that Board. As hereinbefore decided, the Appeal Board was legally appointed prior to the adoption of the Zoning Ordinance on May 16, 1953. As hereinbefore stated, the Commissioners legally created the Appeal Board. There is no requirement in Article 66B, Section 22, supra, that the Appeal Board be created by ordinance.

Appellants interpret the first sentence of Article 66B, Section 21(d), supra, to require the issuance of permits and provisions for enforcement of the Ordinance and claim that there are no such provisions in the Ordinance. The section relied on says nothing about permits and provides that the Commissioners may prescribe the manner in which the regulations may be enforced. Pursuant to Article 66B, supra, Section 34, Section XIV of the Zoning Ordinance provides penalties for its violation.

Of course, as contended by the appellants, powers granted to county commissioners should be strictly construed. *Barnett v. Co. Commissioners for Charles Co.*, ..... Md. ....., 112 A. 2d 492. Judge Hammond said for this Court in the case of *Crozier v. Co. Commissioners Prince George's Co.*, 202 Md. 501, 97 A. 2d 296: "The power of the County Commissioners of Prince George's County to zone or rezone is one that they have only by statutory delegation and can be exercised only to the extent and in the manner the legislature has said that it may be. * * * The requirements of the

ordinance are binding on the Commissioners sitting as a District Council and they may exercise their zoning powers only by following the procedure specified; this is implicit, if not explicit, in Sections 985 and 988 of the Prince George's County Code and Sections 4 and 5 of Article 66B of the Code (1951 Ed.). The cases spell out the necessity of substantially complying with legislative procedural and substantive prerequisites as to notice and hearings if the action of zoning authorities is to be valid. *Heath v. Mayor & C. C. of Baltimore*, 187 Md. 296, 49 A. 2d 799; *Louisville & Jefferson County Planning and Zoning Commission v. Ogden*, 307 Ky. 362, 210 S. W. 2d 771; *Watkins v. Gromley*, Sup., 59 N. Y. S. 2d 747; *Yokley, Zoning Law and Practice*, Section 79 and Section 109; and *Bassett, Zoning*, p. 36." In *Heath v. Mayor & City Council of Baltimore*, supra, the State Enabling Act and the City Zoning Ordinance required that notice be given of application for permits. The contention was made that the property had not been properly posted. This Court there said: "A substantial compliance with the requirements of an administrative regulation in making an application for a permit is sufficient. *People v. Village of Oak Park*, 268 Ill. 256, 109 N. E. 11; *State ex rel. Grimmer v. City of Spokane*, 64 Wash. 388, 116 P. 878." For the reasons herein stated we are of opinion that the procedure followed the enabling legislation sufficiently to make the Zoning Ordinance valid.

It is strenuously contended by the appellants, adjoining property owners, that it is unconstitutional to prevent them from using their property for industrial purposes. It has been well settled in this State that, where a constitutional question is involved, equity may intervene and enjoin the action of an administrative body. This, of course, is not favored where statutory remedies permit the raising of such questions. *Kahl v. Consolidated Gas, Electric Light & Power Co.*, 191 Md. 249, 258, 60 A. 2d 754; *Francis v. MacGill*, 196 Md. 77, 75 A. 2d 91; *Kracke v. Weinberg*, 197 Md. 339, 79 A. 2d 387.

Of course, the power of the government to interfere by zoning regulations with the general rights of the land owner

in restricting the character and use of his property is not unlimited and those rights are within the protection of the Constitution, Federal and State. *Eubank v. City of Richmond*, 226 U. S. 137, 57 L. Ed. 156; *Nectow v. City of Cambridge*, 277 U. S. 183, 48 S. Ct. 447, 72 L. Ed. 842; *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U. S. 116, 49 S. Ct. 50, 73 L. Ed. 210, 86 A. L. R. 654; *City of Baltimore v. Cohn*, 204 Md. 523, 105 A. 2d 482. However, all uses of property which are injurious to the health, comfort, safety and welfare of society may be prohibited under the sovereign power of the state, even though the exercise of such power results in inconvenience or loss to certain persons. In those cases, individual rights are subordinate to the higher rights of the public. The exercise of this police power is an essential attribute of sovereignty. *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205, 8 S. Ct. 273; *Euclid, Ohio v. Ambler Realty Co.*, 272 U. S. 365, 71 L. Ed. 303; *Zahn v. Board of Public Works*, 274 U. S. 325, 71 L. Ed. 1074; *Leventhal v. District of Columbia*, 69 App. D. C. 229, 100 F. 2d 94.

The appellants, in order to sustain their contention, presented testimony that the land sought to be industrialized consists of approximately 836 acres in the Bay Hundred District of Talbot County adjoining the Chesapeake Bay. This land has been used for agricultural and residential purposes for many years. It has not been used for any other purposes. Thirty acres is in marsh land and a small portion is cut-over woodland. The marsh land at one time was used for a terrapin pen. This land for some years has been rented to tenants on a share crop basis, the tenants changing from time to time. As a result the property has been unprofitable and the income therefrom has not equalled the amount of taxes. In fact, 257 acres of this land has not been farmed for at least four or five years. There is no testimony before us to show that by adequate and modern farming operations appellants' land could not be as profitable as other lands in Talbot County. Like all other property bordering the Chesapeake Bay there has been some erosion along the waterfront. In February, 1953,

about two months before the Zoning Ordinance was finally adopted, it became known that the Pan American Refining Corporation was considering locating an oil refinery in the Bay Hundred District which would take in the property of the appellants here. On May 20th or 23rd, 1953, after the enactment of the Zoning Ordinance, the Commissioners of the Town of St. Michaels in the Bay Hundred District and the Pan American Refining Corporation filed an application to rezone property, including that of the appellants, industrial rather than agricultural. In September, 1953, this application was withdrawn as Pan American had decided to locate in Virginia.

Appellants produced expert witnesses who testified that the property was the most suitable site for general modern industry on the Atlantic Seaboard between Sandy Hook and Cape Charles which had not already been occupied by industry or by the military services. The depth of the water and the nature of the shore line was such that it was economically practical to construct a large deep water port with sufficient depth to accommodate the largest ocean-going vessels. At the argument in this Court it was admitted that the water for a distance of approximately one-half mile from appellants' property is only three or four feet deep and that no better harbor now exists at this location than at any other exposed waterfront on the Chesapeake Bay. According to appellants' witnesses, in order to create a harbor it would be necessary to spend approximately five million dollars for dredging. This dredging would create from 1000 to 1375 acres of new land. To provide the necessary pier facilities would cost approximately fifteen million dollars. An oil refinery at this location would cost approximately fifty million dollars. It is shown by hydrographic charts that many other areas in this general locality could be made into deep water ports by the expenditure of practically the same amount of money as would be necessary here. In fact, some of the same facilities are available at Wade Point only a few miles distant from appellants' property.

Another expert witness, produced by the appellants, testified that water tests on their property showed a water

supply beneath the surface, sufficient to produce twenty million gallons of water a day, which was adequate for a large oil refinery or other heavy industry, without probable effect on the water now used in that area. However, it was admitted that in order to produce this amount of water it would be necessary to put in ten wells which would require an area of from 6½ to 7 miles, which is larger than appellants' property. However, this expert witness admitted that this same water supply ran all the way across the whole Eastern Shore of Maryland and out-cropped in the ocean beyond the Continental Shelf and that this water supply was not peculiar to appellants' property. Appellants also stress the fact that their property, with adequate waterfront, is near railroads and good highways. Maps offered in evidence show other locations in Talbot County with adequate water front near railroads and good highways. From the testimony and exhibits it could be reasonably found that appellants' property was no more suitable for a deep water port than many other locations along the Chesapeake Bay with the expenditure of the same amount of money required here. Appellants stress the fact that they obtained a Necessity Certificate from the Office of Defense Mobilization on February 3, 1955. The only effect of this Certificate is the declaration by the Office of Defense Mobilization that the installation is essential in national defense, and that a five year tax write off would be granted by the Government. These certificates are intended to encourage people to disperse industry in order to aid the national defense. To encourage such dispersement the income tax advantage is given. It appears that the Certificate here was issued for a period of six months only. If construction is not started within that time or an explanation made why it has not been started, the Certificate will be cancelled.

Under the Zoning Ordinance, appellants' property is zoned for agriculture, home occupation, single family dwellings, guest houses, boarding houses and employee housing, among other things. The fact that appellants' property is less profitable, being used for agricultural or residential rather than industrial purposes, is not a sufficient basis for holding that the police power has been improperly exer-

cised. Where the uses of property are detrimental to the public health, safety, morals or general welfare, such uses may be prohibited even though it will result in inconvenience or loss to individuals. These individual rights are subordinate to the higher rights of the public. *Byrne v. Maryland Realty Co.*, 129 Md. 202, 98 A. 547; *Carney v. City of Baltimore*, 201 Md. 130, 93 A. 2d 74. In the case of *Kracke v. Weinberg*, supra, strongly relied on by the appellants, it was stated that the value of the land for sale or lease was undoubtedly much less when it was restricted to residential uses and, although this is true of all property affected by residential zoning, too much weight could not be given to the fact that the value of the land is thereby decreased. It was said in *Easter v. City of Baltimore*, 195 Md. 395, 73 A. 2d 491: "The mere fact that the variance would make the property more profitable is not a sufficient ground to justify a relaxation of setback requirements. *Garden View Homes v. Board of Adjustment*, 137 N. J. L. 44, 57 A. 2d 677." See also *Ellicott v. City of Baltimore*, 180 Md. 176, 23 A. 2d 649; *American Oil Company v. Miller*, 204 Md. 32, 42, 102 A. 2d 727; *Zahn v. Board of Public Works*, supra. In such cases as *N. W. Merchants Term. v. O'Rourke*, 191 Md. 171, 60 A. 2d 743, *Hoffman v. City of Baltimore*, 197 Md. 294, 79 A. 2d 367; *Kracke v. Weinberg*, supra; and *City of Baltimore v. Cohn*, supra, it was found that the property could not reasonably be used for the purposes for which it was zoned. An expert witness for appellants gave a very high estimate as to the value of appellants' land. In *Anne Arundel County v. Ward*, (1946), 186 Md. 330, 46 A. 2d 684, the denial of the right to erect certain types of houses in a residential area, contrary to the zoning regulations, was upheld. In *Anne Arundel County v. Snyder*, (1946), 186 Md. 342, 46 A. 2d 689, the denial of the right to build a show room and store room and the construction of a dock, forbidden by the zoning ordinance, was affirmed. In *Zang & Sons, Builders, Inc. v. Taylor*, (1954), 203 Md. 628, 102 A. 2d 723, the denial for the erection of an open air drive-in motion picture theatre in a "Cottage Residential" area was upheld. In *American Oil Company v. Miller*, (1954), supra, the erection of a gasoline filling station in an agricultural area on the Ritchie

Highway, near Annapolis, was denied. In *Temmink v. Board of Zoning Appeals for Baltimore County*, (1954), 205 Md. 489, 109 A. 2d 85; *Waitman Zinn, et al v. Board of Zoning Appeals of Baltimore County, et al*, No. 138, This Term, ..... Md. ....., ..... A. 2d .....; and *Schiff, et al v. Board of Zoning Appeals of Baltimore County, et al*, No. 143, This Term, ..... Md. ....., ..... A. 2d ....., the erection of shopping centers in residential areas was denied.

There is testimony that many of the people in the Bay Hundred District are strenuously opposed to zoning and to the prohibition of industrial uses in that District. Exercise of the police power in zoning regulations cannot be governed "by a plebiscite of neighbors or for their benefit." *Benner v. Tribbitt*, 190 Md. 6, 20, 57 A. 2d 346. Testimony was offered by the appellees which shows that Talbot County is essentially a rural area of about 20,000 people, approximately 10,000 of whom live in Easton, the County Seat. The remaining 10,000 live on farms or in small country towns and get their livelihood from the land, or water. For perhaps three hundred years this County has grown slowly in population and is a very harmonious development. The economy has been balanced between light industry, agriculture and services for the agricultural population. Practically all of the population works directly or indirectly in the production of farm produce and products or in processing those products. Practically everybody seeking employment is employed. There is only about five percent of unemployment and no floating labor supply. This County has been practically immune to depression because the people live primarily off the land and in towns catering to the wants of the people on the farms.

Early in 1951, the bridge across the Chesapeake Bay being imminent, zoning was deemed advisable by many residents of Talbot County. Mr. Irving C. Root, a professional planner experienced in zoning, was employed. He has been engaged in planning work since 1918. From 1927 to 1940 he was chief engineer of the Maryland National Capital Park and Planning Commission and prepared a master plan for suburban Washington which consisted of

three hundred square miles in Montgomery and Prince George's Counties. He was City Planning Consultant for the United States Department of Interior. He made exhaustive land use study and a field survey in Talbot County. He started work there in November, 1951, and continued practically continuously until January, 1954. He stated that the Zoning Ordinance finally adopted was based on a comprehensive plan. The question of industrial opportunities in Talbot County was studied and he testified that under the Zoning Ordinance fifty times more industrial area is provided in Talbot County than now exists as active industry, and that an extremely large amount of commercial and industrial property has been added. Transportation facilities have been considered in zoning the industrial areas. He said: "Through many years industry has developed in certain places in Talbot County, and those places were considered as the logical place for more industrial expansion, and that's why the areas where the canneries are is enlarged so that they could have more canneries. The seafood packing places on the water-front were enlarged so they could have large expansion. Beyond that it would be merely visionary as to where you would put additional industrial zones." He further said that ample provision had been made for enormous industrial expansion.

Numerous public meetings were held throughout the County to discuss the Zoning Ordinances. That Ordinance adopted by the Commissioners reflected not only competent professional study, but consideration over a long period of time by the Commission and the general public. The Ordinance, as adopted, was consistent with the fundamental framework of the County's economic and social life and such as to promote the health, safety and general welfare of its citizens. It is settled law that where a legislative body, using properly the powers given it by the Legislature, has adopted a zoning ordinance, its exercise of the police power is presumed to be valid. A successful attack upon such an ordinance must show affirmatively and clearly that it is arbitrary, capricious, discriminatory or

illegal, so that necessarily a review by a court is narrow in scope. *Anne Arundel County v. Ward*, supra. We cannot find grounds here for successful attack upon the Ordinance as a whole.

To appellants' earnest contention that even though the Ordinance be held validly adopted, and to be generally applicable and effective, nevertheless, as applied to their property, it is so arbitrary and unreasonable as to be unconstitutional, we find the answer to be that the restrictions of the Ordinance do not deprive the appellants of many uses for which their property is reasonably adapted, and that, therefore, they have no just claim for relief. The testimony shows that the appellants' property does not differ from other farm land in the vicinity. An experienced real estate man testified for the appellees that he had known the property for many years and that it was "a lovely place to live." He added that if appellants' land were zoned industrial and no industry was established, other property in the neighborhood would be depreciated. He, undoubtedly, had in mind the well-known fact that many of the Talbot County farms have been bought for and used as country estates. He admitted on cross-examination that it was possible that an industrial market might open up which would make the land of greater value. The fact that by the expenditure of many millions of dollars, appellants' land could be made attractive to commercial users, does not amount to a valid showing that the zoning restrictions are arbitrary and unreasonable as applied to land which under such restrictions may be used for many purposes for which it is adapted, such as farming, sub-division, a country estate, a guest house or a boarding house. In *Baltimore City v. Cohn*, supra, where there was a finding of arbitrary and unreasonable zoning, as applied to a particular lot, the controlling principles were succinctly set forth as follows: "It is recognized that although a zoning ordinance is not invalid *per se*, yet when the provisions of such an ordinance come to be applied to particular premises, it may be found to be clearly arbitrary and unreasonable. A particular provision or application of a zoning ordinance may be held invalid where it restricts property to uses for which

it is not adapted. A zoning restriction may be regarded as arbitrary and unreasonable as to a property owner who is unable to use his property for any of the permitted purposes and is therefore deprived of all beneficial use thereof.

"Thus we reaffirm the doctrine that a zoning ordinance which permanently so restricts the use of property that it cannot be used for any reasonable purpose goes beyond permissible regulation, and must be regarded as a taking of property without compensation. *Northwest Merchants Terminal, Inc. v. O'Rourke*, 191 Md. 171, 60 A. 2d 743; *Hoffman v. Mayor and City Council of Baltimore*, 197 Md. 294, 79 A. 2d 367; *Arverne Bay Construction Co. v. Thatcher*, 278 N. Y. 222, 15 N. E. 2d 587, 117 A. L. R. 1110. To sustain an attack upon the validity of the ordinance, an aggrieved property owner must show that if the ordinance is enforced the consequent restrictions upon his property preclude its use for any purpose to which it is reasonably adapted, * * *." Applying this yardstick, as we must, to appellants' property their case falls. The decree will be affirmed.

DECREE AFFIRMED, WITH COSTS.

HAROLD B. WILLEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955

## No. 441

ALONSITA WALKER, ET AL.,

*Petitioners,*

VS.

BOARD OF COUNTY COMMISSIONERS OF TALBOT COUNTY, ET AL.,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

## BRIEF FOR RESPONDENTS IN OPPOSITION

T. HUGHLETT HENRY, JR.,
Easton Maryland,

CHARLES ELLIOT WHEELER,
Easton Maryland,
Counsel for Respondents.

HENRY & HENRY,
MILLER & WHEELER,
Of Counsel.

The Daily Record Co., Baltimore 3, Md.

# INDEX

## Table of Contents


| | PAGE |
|---|---|
| Question Presented | 1 |
| Statement of the Case | 3 |
| Reasons for Denying Writ | 5 |
| I. The Decision of the Court of Appeals of Maryland is Not in Conflict with Any Applicable Decision of this Court, Nor Does it Involve a Federal Question Not Heretofore Determined By This Court | 5 |
| II. A Conflict Between the Decisions of Two State Courts Is Not Among the Usual Criteria for Granting Certiorari | 8 |
| III. The Decision of the Court of Appeals of Maryland Is Not in Conflict with the Decisions of Other State Courts on Similar Questions | 9 |
| IV. This Case Does Not Present a Question of Great Public Importance | 11 |
| V. There is No Conflict in the Previous Decisions in This Case | 11 |
| Conclusion | 12 |


## Table of Citations

*Cases:*


| | |
|---|---|
| *Arverne Bay Construction Co. v. Thatcher*, 278 N. Y. 222, 15 N. E. 2d 587 (1938) | 10 |
| *City of West University Place v. Ellis*, 118 S. W. 2d 907 (Tex. Civ. App. 1938), *aff'd.* 134 Tex. 222, 134 S. W. 2d 1038 (1940) | 9 |
| *Comer v. City of Dearborn*, 342 Mich. 471, 70 N. W. 2d 813 (1955) | 9 |

PAGE

*Dallas v. Lively*, 161 S. W. 2d 895 (Tex. Civ. App. 1942) ..... 9

*DeLana v. Tulsa*, 26 F. 2d 640 (8th Cir. 1928), *cert. denied* 278 U. S. 654 (1929) ..... 7, 8

*Euclid v. Ambler*, 272 U. S. 365 (1926) ..... 7

*Hannifin Corp. v. City of Berwyn*, 1 Ill. 2d 28, 115 N. E. 813 (1953) ..... 9

*Lockard v. Los Angeles*, 33 Cal. 2d 453, 202 P. 2d 38 (1949), *cert. denied* 337 U. S. 939 (1949) ..... 7, 8

*Marblehead Land Co. v. Los Angeles*, 47 F. 2d 528 (9th Cir. 1931), *cert. denied* 284 U. S. 634 (1931) 7, 8

*Nectow v. Cambridge*, 277 U. S. 183 (1928) ..... 6, 8

*Tower Cabana Club v. Chicago*, 5 Ill. 2d 11, 123 N. E. 2d 834 (1955) ..... 9

*Vernon Park Realty Co. v. Mount Vernon*, 307 N. Y. 493, 121 N. E. 2d 517 (1954) ..... 10

*Walker v. County Commissioners*, 116 A. 2d 393 (Md. 1955) ..... 6

*Zahn v. Board of Public Works*, 274 U. S. 325 (1927) ..... 6, 7, 8, 10

*Miscellaneous:*

Recent case, 68 Harv. L. Rev. 1089 (1955) ..... 10

Rule 19, United States Supreme Court (1954) ..... 8, 9

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955

## No. 441

ALONSITA WALKER, ET AL.,

*Petitioners,*

VS.

BOARD OF COUNTY COMMISSIONERS OF TALBOT COUNTY, ET AL.,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

## BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents concede the correctness of Petitioners' citation of the opinion below, of the jurisdictional statement and of the recitation of constitutional provisions and the ordinance involved in this case.

### QUESTION PRESENTED

The sole and simple question presented in this case:

Is a zoning ordinance enacted by duly constituted zoning officials, and upheld by two State Courts, invalid under the Fourteenth Amendment of the Federal Constitution because it prohibits industrial use of the Petitioners' property

while permitting its use for other purposes for which it is reasonably adapted?

The questions claimed by Petitioners to be presented are not remotely involved. Petitioners' purported questions are based on assumptions of fact that are specifically disproved by the findings of the Court of Appeals of Maryland.

Thus in the alleged first question, Petitioners assume that the zoning regulation in this case limits the use of the properties to the impractical and the unprofitable. The Court of Appeals specifically held that "There is no testimony before us to show that by adequate and modern farming operations appellants' [Petitioners'] land could not be as profitable as other lands in Talbot County (Pet. App. B 26).* It also specifically held that there were several practical uses for the properties as zoned (Pet. App. B 32).

In framing this asserted question, Petitioners have also assumed the existence of a finding that industrial use of their properties would cause no disadvantage or loss to the surrounding properties or to the public. No such finding was made either by the Trial Court or by the Court of Appeals of Maryland. The Court of Appeals in its opinion reviewed the direct conflict in testimony on this point (Pet. App. B 32).

In framing an asserted second question, Petitioners have assumed that, in determining the validity of the ordinance as applied to their properties, the Court of Appeals deemed itself barred from considering facts not known to the zoning officials at the time the ordinance was enacted. This is incorrect. The Trial Court did state that facts not brought

---

* Figures in parentheses preceded by "Pet. App." are references to the appendix to the Petition filed herein; figures preceded by "App." refer to Petitioners' Appendix in the Court of Appeals of Maryland.

to the attention of the Zoning Officials need not be taken into account by the Court in deciding whether this action was unreasonable (Pet. App. A 15). The Court of Appeals, however, reviewed *all* the facts, including those brought to light subsequent to enactment of the ordinance, in its determination that the industrial adaptability of Petitioners' properties was not "peculiar" to those properties (Pet. App. B 27-30) and in its finding that ". . . the restrictions of the Ordinance do not deprive the appellants of many uses for which their property is reasonably adapted." Not only did the Court of Appeals not disregard the issue of peculiar adaptability as a deep water port, it specifically considered it and found ". . . that many other areas in this general locality could be made into deep water ports by the expenditure of practically the same amount of money as would be necessary here" (Pet. App. B 28).

## STATEMENT OF THE CASE

The Talbot County Zoning Commission, after careful study and several public hearings, unanimously determined that Petitioners' properties should be zoned for agricultural use. The County Commissioners of Talbot County, after a full public hearing, enacted the Ordinance by unanimous agreement. The validity of the Ordinance was upheld by the Circuit Court for Talbot County. Its decision was affirmed by a unanimous decision of the Court of Appeals of Maryland. Thus, the question of the appropriate zoning classification has been considered by an administrative agency, a legislative body and two Courts, and in each instance, and without a dissenting voice, the decision has been adverse to Petitioners' contentions (Pet. App. A, Pet. App. B 16, 22, 23, 30-31).

Petitioners' statement is a forceful presentation of certain facts and inferences most favorable to their position.

It refers mainly to findings made in the Trial Court, and to testimony of Petitioners' witnesses below. It fails to indicate the following pertinent facts:

1. Petitioners' properties are located in a large agricultural zone, have been used for agricultural and residential purposes for some three hundred (300) years, and together with the similar adjoining properties, are still being so used (App. 227, 271, 292, 300, 313; Pet. App. B 14).

2. There is nothing "peculiar" about Petitioners' properties. The water depth, shore line, underground water resources, access to transportation facilities, etc., which exist with reference to Petitioners' properties, also are present with reference to many properties situated on Talbot County's extensive waterfront, and to most of the properties near the Petitioners' lands (App. 72, 74, 160, 179-180, 183; Pet. App. B 27-28).

3. The evidence of "peculiar suitability" was contradicted, not only by Petitioners' own exhibits and witnesses, but also by testimony produced on behalf of respondents (App. 74, 160, 179-180, 183; Pet. App. B 27-28).

4. The depth of water for a distance of one-half mile off Petitioners' lands is only three or four feet; no port now exists at this site, and to construct one, together with an industrial facility, would cost approximately twenty million to fifty million dollars (App. 173; Pet. App. B 27).

5. It is impossible to determine, with any degree of accuracy, the alleged monetary loss suffered by Petitioners, because there is no evidence whatsoever of the present value of the bulk of Petitioners' properties.

6. There is no evidence in the case that Petitioners' properties could not be farmed as profitably as any other farms in Talbot County, if Petitioners so desired. The evidence

indicates that these properties can be reasonably used for farming, residential purposes, and numerous other uses permitted in an agricultural zone (App. 271-272, 292, 298, 300; Pet. App. B 32).

## REASONS FOR DENYING WRIT

It is submitted that the Writ should be denied for the following reasons:

I. The decision of the Court of Appeals of Maryland is not in conflict with any applicable decision of this Court, nor does it involve a Federal question not heretofore determined by this Court.

II. A conflict between the decisions of two States is not among the usual criteria for granting certiorari.

III. The decision of the Court of Appeals of Maryland is not in conflict with the decisions of other State Courts on similar questions.

IV. This case does not present a question of great public importance.

V. There is no conflict in the previous decisions in this case.

### I.

**The Decision of the Court of Appeals of Maryland is not in Conflict with any Applicable Decision of this Court, nor Does it Involve a Federal Question not Heretofore Determined by this Court.**

The Court of Appeals of Maryland, having found that Petitioners' properties were reasonably usable as zoned, held, in effect, that the question of the reasonableness of the classification was fairly debatable, and that in such circumstances, the Court would not intervene to overturn the action of the local legislative body. Having determined

that mere financial loss was not sufficient to invalidate the zoning, and that reasonable use of the property was practical and proper, the Court concluded that the Ordinance, as applied to Petitioners' properties, was not unconstitutional; *Walker v. County Commissioners,* 116 A. 2d 393, 403, 404 (Md. 1955); (Pet. App. B 28-29, 31-33).

Not only is this holding not in conflict with applicable decisions of this Court, but it is difficult to see how, in the face of such applicable decisions, the Court of Appeals could have reached any other result.

Thus, in *Nectow v. Cambridge,* 277 U. S. 183 (1928), property zoned residential was located adjacent to a railroad, and industrial and commercial properties. Considering these facts, as well as the financial factors, it was found that the property was of no practical use for residential purposes, and, therefore, this Court held that the zoning amounted to deprivation of property in violation of the Fourteenth Amendment.

In the instant case, involving property zoned agricultural, used for farming and residential purposes, and surrounded by properties similarly zoned and used, the Court of Appeals held that the property was capable of numerous reasonable uses as zoned (Pet. App. B 32). The Court, therefore, concluded that there was no unconstitutional deprivation of property. The essential finding in *Nectow v. Cambridge, supra,* that the property was incapable of reasonable use as zoned, clearly distinguishes it from the present case.

A case much more in point is that of *Zahn v. Board of Public Works,* 274 U. S. 325 (1927). In that case, property in a largely unimproved neighborhood was zoned residential. It was proved that the property was more valuable for business than for residential purposes. It did not appear,

however, that the property could not be used for residential purposes. On these facts, which are remarkably similar to those in the case at bar, this Court refused to hold the ordinance unconstitutional as applied to the property. Rather, the question of whether the ordinance, as applied, was arbitrary and unreasonable was held to be "fairly debatable" and this Court, therefore, refused to substitute its judgment for that of the legislative body. It is submitted that the holding of the Court of Appeals of Maryland is precisely in accord with the ruling of this Court in *Zahn v. Board of Public Works, supra,* and also follows the general principles laid down in the leading case of *Euclid v. Ambler,* 272 U. S. 365 (1926).

In a number of more recent cases zoning has been upheld against Fourteenth Amendment objections upon findings that the property involved was capable of use as zoned, even though less valuable as zoned. In each of these cases, this Court has denied certiorari; *Marblehead Land Co. v. Los Angeles,* 47 F. 2d 528 (9th Cir. 1931), *cert. denied* 284 U. S. 634 (1931); *DeLana v. Tulsa,* 26 F. 2d 640 (8th Cir. 1928), *cert. denied* 278 U. S. 654 (1929); *Lockard v. Los Angeles,* 33 Cal. 2d 453, 202 P. 2d 38 (1949), *cert. denied* 337 U. S. 939 (1949).

It is submitted that the aforegoing authorities clearly show that the decision of the Court of Appeals of Maryland carefully follows the well-established rule that if property is reasonably usable as zoned, the zoning is not a deprivation of property without due process of law, and in such cases, a Court will not intervene to substitute its judgment for that of the legislative body involved.

It is apparent that no new question is involved in this case. Petitioners advocate a rule that zoning is unconstitutional if it does not permit the most economically advan-

tageous use of property. This Court has repeatedly held that the test of confiscation in zoning is not whether it is zoned for its most advantageous use but whether it may be reasonably used as zoned; *Nectow v. Cambridge* and *Zahn v. Board of Public Works, supra.* This Court has further refused to interfere with the legislative determination of this question when the administrative decision is "fairly debatable"; *Zahn v. Board of Public Works, supra.* We are here concerned with precisely the same sort of issue which this Court refused to review in *Marblehead Land Co. v. Los Angeles, DeLana v. Tulsa,* and *Lockard v. Los Angeles, supra.*

For the aforegoing reasons, Petitioners fail to show the existence of the two express criteria for the granting of Certiorari as set forth in Supreme Court Rule 19 1. (a) (1954).

## II.

**A Conflict Between the Decisions of Two State Courts is not Among the Usual Criteria for Granting Certiorari.**

Petitioner alleges that the decision in this case is in square conflict with decisions in four other States. Rule 19 of this Court indicates that a conflict between decisions of United States Courts of Appeals will be considered in granting certiorari to such Courts, but that, with respect to a State Court decision, the only conflict to be considered is a conflict with this Court's previous rulings.

If in fact this case conflicts with another State decision, such a conflict cannot be corrected by this Court if certiorari is granted, unless the decision in this case is the one which conflicts with decisions of this Court or unless it pertains to a federal question of substance not heretofore determined by this Court.

## III.

## The Decision of the Court of Appeals of Maryland is not in Conflict With the Decisions of Other State Courts on Similar Questions.

Even assuming that a conflict between decisions of State Courts is a persuasive reason for granting Certiorari (which is doubtful, considering that Supreme Court Rule 19 1. (b) applies only to Federal Courts) no such conflict exists here.

Petitioners cite *Tower Cabana Club v. Chicago*, 5 Ill. 2d 11, 123 N. E. 2d 834 (1955); *Hannifin Corp. v. City of Berwyn*, 1 Ill. 2d 28, 115 N. E. 2d 813 (1953); and *City of West University Place v. Ellis*, 118 S. W. 2d 907 (Tex. Civ. App. 1938), *aff'd.* 134 Tex. 222, 134 S. W. 2d 1038 (1940), among others, in an attempt to indicate such a conflict. A brief examination of the above cases will indicate that each of them involved property zoned residential located in an area largely commercial or industrial, or otherwise unsuited for residential use. For example, in *Hannifin Corp. v. City of Berwyn, supra*, the property adjoined industrial properties and two railroads, carrying over 139 trains per day. In some, as in *City of West University Place v. Ellis, supra*, the property was topographically unsuited for residential use. The extremely narrow applicability of this case is plainly indicated in the later Texas case of *Dallas v. Lively*, 161 S. W. 2d 895 (Tex. Civ. App. 1942). In each case, the question of financial loss was only one factor considered. In each case, after weighing all the numerous factors involved, the Court found that the property could not be reasonably used as zoned.

The case of *Comer v. City of Dearborn*, 342 Mich. 471, 70 N. W. 2d 813 (1955) presents the obverse side of the same coin. In that case property in a zone which the Court found to be not then, or for a long time thereafter likely to be,

utilized for industrial purposes, was restricted to industrial use and dwellings were prohibited. Having concluded that the neighborhood was not an industrial one, the Court held that the ordinance, as applied, was unreasonably restrictive because the prohibition of dwellings in a non-industrial area had no relation to public health, safety and welfare.

It is true that in the case of *Vernon Park Realty Co. v. Mount Vernon*, 307 N. Y. 493, 121 N. E. 2d 517 (1954) the Court of Appeals of New York used language suggesting that it might invalidate a zoning ordinance which precluded the use for which property was most readily adapted. Such a rule, if based on Federal Constitutional grounds, would certainly be in conflict with the holding of the case at bar, and also with the holding of every other case in point which respondents have been able to locate, including the applicable decisions of this Court; see especially *Zahn v. Board of Public Works, supra.*

But it is far from clear that such is the holding of the *Vernon Park* case. It may well be that the Mount Vernon ordinance was held unconstitutional because highly discriminatory, in that it zoned certain property in a way different from the very similar adjoining properties, a situation not present in the instant case; see criticism of this decision in 68 Harv. L. Rev. 1089, 1090 (1955). That the New York Court did not use the "most readily adapted" test is further indicated by its citation, in support of the *Vernon Park* decision, of the leading New York case of *Arverne Bay Construction Co. v. Thatcher*, 278 N. Y. 222, 15 N. E. 2d 587 (1938), which clearly enunciates the "reasonably usable" rule applied by the Court of Appeals of Maryland, and enunciated by this Court.

It is also not clear whether the Court of Appeals of New York decided any Federal Constitutional question. It did

not consider at length the Fourteenth and Fifth Amendments, and similar provisions of the New York Constitution could have afforded a sufficient basis for the decision.

It is suggested that Petitioners have erroneously assumed the presence of conflict from the existence of varying conclusions based on factual situations completely unlike those appearing in the instant case.

## IV.

### This Case Does not Present a Question of Great Public Importance.

This is a routine zoning case in which four adjacent farms and residences in the midst of an agricultural district have been zoned, together with the general area surrounding them, agricultural. The owners of the property desire that they be zoned industrial. A decision in this case can only affect these four properties and can hardly be considered of public importance except as to the limited public consisting of Petitioners and their opposing neighbors.

## V.

### There is no Conflict in the Previous Decisions in this Case

This Court is asked by Petitioners to review the facts pertaining to the zoning of their properties for the fifth time.

The Planning and Zoning Commission of Talbot County was aware of the desire of an oil refinery to use Petitioners' properties and its unanimous determination was that the proper zone was agricultural. A similar conclusion was reached by the County Commissioners of Talbot County when they enacted the zoning ordinance. The Circuit Court for Talbot County heard testimony for four days as to the appropriate use of Petitioners' properties and found them

to be properly zoned. The Court of Appeals of Maryland in Equity cases has the right to, and in this case did, review the voluminous testimony and exhibits. While it failed to agree with the lower Court in some of the particulars of its findings, (especially in respect to those findings quoted in Petitioners' Petition at pages 4 and 5) it unanimously affirmed the decision and found the properties in question to be properly zoned.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

T. HUGHLETT HENRY, JR.,
Easton Maryland,

CHARLES ELLIOT WHEELER,
Easton Maryland,
Counsel for Respondents.

HENRY & HENRY,

MILLER & WHEELER,

Of Counsel.

NOV 1955
HAROLD B. WILLEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955

No. 441

ALONSITA WALKER, ET AL.,
*Petitioners,*

vs.

BOARD OF COUNTY COMMISSIONERS OF TALBOT COUNTY, ET AL.,
*Respondents.*

## PETITIONERS' REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

HYMAN A. PRESSMAN,
337 St. Paul Place,
Baltimore 2, Maryland,

HERBERT H. BALCH,
Easton, Maryland,
Counsel for Petitioners.

The Daily Record Co., Baltimore 3, Md.

# INDEX

## Table of Contents


| | PAGE |
|---|---|
| Public Importance of the Case | 1 |
| Conflicting State Court Decisions | 3 |
| Deprivation of Property Rights | 3 |
| Conclusion | 4 |


## Table of Citations


| | |
|---|---|
| Nectow v. City of Cambridge, 277 U.S. 183 | 2, 4 |
| Supreme Court Practice, Stern & Gressman | 3 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955

## No. 441

ALONSITA WALKER, ET AL.,

*Petitioners,*

VS.

BOARD OF COUNTY COMMISSIONERS OF TALBOT COUNTY, ET AL.,

*Respondents.*

## PETITIONERS' REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

### PUBLIC IMPORTANCE OF THE CASE

Respondents aver in their brief that this case does not present a question of great public importance and that it is only of importance to the Petitioners and their opposing neighbors. For a case of such limited importance, it is indeed peculiar that one hundred and fifty-two taxpayers and property owners, together with the Bay Hundred Anti-Zoning League having more than five hundred members, intervened as parties plaintiff. Almost every occurrence in the case has received front page coverage in Talbot County's leading newspaper and each important turn has

been reported in other newspapers of the State of Maryland, including the daily newspapers of Baltimore City.

The reasons for the widespread interest in the case are manifold. This case will decide whether major seaports in the State of Maryland will be limited in depth to the thirty feet which exists in Baltimore harbor or will be expanded to admit the largest capital ships afloat in the forty-five feet of water at the seaport which Petitioners desire to construct. This case will decide whether young people in Talbot County will continue to be compelled to leave the county to seek employment or will join all people in the area in the enjoyment of a new prosperity. The ultimate decision in this case will determine whether property values, not only of the petitioners' property but all surrounding properties, will be increased. It will decide whether the precious natural resources which make the petitioners' property the most suitable site for general modern industry on the Atlantic seaboard which has not already been occupied by industry or the military services shall go to waste or be used for the purposes for which nature must have intended. This case will decide whether a project which has been officially declared by the Office of Defense Mobilization to be necessary for national defense will be used for national defense or not. Another determination will be whether the overwhelming majority of the people of Talbot County who want industry will receive or be denied the benefits which it would bring to them.

It will also be important to the nation as a whole to have a fresh decision from the Supreme Court of the United States on the subject of zoning which has not been ruled upon by this Court in the twenty-seven years since the decision in Nectow v. City of Cambridge, 277 U. S. 183, 48 S. Ct. 447, 72 L. Ed. 842.

## CONFLICTING STATE COURT DECISIONS

Respondents contend that a conflict between the decisions of the highest courts of two states on a federal question may not be considered by this Court. This contention is at variance with the following statement in Supreme Court Practice (1954 Edition) by Robert L. Stern and Eugene Gressman, page 141:

> "A conflict between the decisions of the highest courts of two or more states on a federal question is also a valid ground for Supreme Court review."

## DEPRIVATION OF PROPERTY RIGHTS

It is true that the Court of Appeals of Maryland stated in its opinion that "it could be reasonably found that appellants' property was no more suitable for a deep water port than many other locations along the Chesapeake Bay with the expenditure of the same amount of money required here". However, this statement is not only unsubstantiated by any evidence but is completely erroneous. It is in conflict with the uncontradicted testimony of eminent expert witnesses who testified that this site is the most suitable on the Atlantic seaboard which has not already been occupied by industry or the military services. The Judge of the Circuit Court for Talbot County stated that the Petitioners established by the evidence "that the depth of the water and nature of the shore line at these properties made them more suitable for a deep water port than any location on the Atlantic seaboard from Sandy Hook to Cape Hatteras that was immediately available" (Petitioner's Appendix A, p. 14). The Court of Appeals statement that "the restrictions of the Ordinance do not deprive the appellants of many uses for which their property is reasonably adapted" is likewise unsubstantiated by the evidence. The property consists of unprofitable farmland (App. 210, 298), poor marshland (App. 43, 211, 212, 298) and cut over woodland

(App. 296, 297). The income from the land is less than the amount of taxes (App. 211).

Petitioners therefore lost in the lower court where the judge made proper findings of fact, based on the uncontradicted evidence in the case, but erroneously applied the law by declaring that the facts could not be considered because they were not known at the time of the enactment of the zoning ordinance. Petitioners lost in the Court of Appeals of Maryland because of findings of fact which were unsupported by the evidence, contrary to the findings of the trial judge who heard the evidence and in conflict with the uncontradicted evidence in the case. Petitioners feel that they are entitled to correct findings of both fact and law. The correct findings of fact of the lower court concerning the peculiar suitability of Petitioners' property, when combined with the correct rule of law that these facts can be considered even if they were not known when the ordinance was enacted, establish the unquestionable merit of the Petitioners' cause. These uncontradicted facts establish, as was done in the Nectow case, that the uses which the zoning ordinance permits on the property are "of comparatively little value" and the ordinance is therefore unconstitutional insofar as it applies to the property.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

HYMAN A. PRESSMAN,
337 St. Paul Place,
Baltimore 2, Maryland,

HERBERT H. BALCH,
Easton, Maryland,
Counsel for Petitioners.